IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

Writ Petition No.4225 of 2005

Ashokkumar Hiralal Lohiya — Petitioner

Vs.

The Hon'ble High Court of
Judicature at Bombay & anr. — Respondents

Mr.R.D.Soni i/b. M/s.Ram & Co. for petitioner.

Mr.A.A.Kumbhakoni, Associate Advocate General with
Mrs.M.P.Thakur, AGP for respndents.

CORAM: B.H.MARLAPALLE & NARESH H.PATIL,JJ.

September 22, 2006.

ORAL JUDGEMENT (PER B.H.MARLAPALLE,J.):

1. This petition filed under Article 226 of the Constitution challenges the order of compulsory retirement dated 3rd November 2004 passed under Rule 10(4)(a)(i) of the Maharashtra Civil Services (Pension) Rules, 1982 by the Governor / State Government on the recommendations of the High Court on its administrative side and also the communication dated 28th February 2005 addressed to him by the

Registrar General of this Court informing him that the representation filed by him on 21/12/2004 was rejected by the Hon'ble Chief Justice and Judges of this Court.

2. Rule. Respondents waive service. Rule is taken up for final hearing forthwith with the consent of the parties.

3. The petitioner was born on 12th June 1950 and came to be enrolled as an advocate in 1974. He entered the judiciary as a Civil Judge, Junior Division and Judicial Magistrate, First Class on 19/7/1978. He came to be promoted as Civil Judge, Senior Division in November 1987. He was further promoted to the post of Additional District Judge towards the end of 1988 and he was brought in the District Judges' cadre (as then it was) in August 1997 and was posted as Joint District Judge at Pune and was transferred to Solapur and thereafter to Nagpur. He came to be appointed as the District and Sessions Judge, Osmanabad on 22/9/2003.

4. Mr.Soni, the learned counsel for the petitioner submitted that the petitioner's entire

service record was good, his disposal was recorded either as Noteworthy or Good / Satisfactory and at no point of time he was ever intimated any adverse confidential remarks against him, about his integrity, character and behaviour etc. By relying upon the communication dated 18/11/1999 received by the petitioner from the Registrar, Appellate Side of this Court it was contended that on attaining the age of 50 years he was subjected to the first review as contemplated under Rule 10(4)(a)(i) of the Pension Rules and, therefore, he could not have been subjected to a second review unless he had attained the age of 55 years and on the contrary he has been compulsorily retired by the impugned order after he crossed the age of 54 years. If his entire service record is taken into consideration, there was no case against him to retire him compulsorily in public interest as he was neither a dead wood nor his integrity was doubtful or his character was unbecoming of a Judge. All along he was intimated that his disposal was noteworthy or satisfactory and having been granted the promotion in August 1997 and further having been appointed as the District and Sessions Judge, Osmanabad on 22/9/2003, there was no case to hold that the petitioner’s utility for being

retained in judicial service had extinguished and in public interest he was required to be compulsorily retired. In support of these arguments the learned counsel for the petitioner referred to a number of decisions and some of them are as follows:

. Swami Saran Vs. State of U.P. **[AIR 1980 SC 269]**, Madan Mohan Choudhary Vs. State of Bihar [**AIR 1999 SC 1018],** P.K. Shastri vs. State of M.P. [**AIR 1999 SC 3273**], State of Gujarat vs. Umedbhai M Patel [**AIR 2001 SC 1109**]. He also relied upon a decision of this Court in the case of Arvind M. Shah vs. High Court of Judicature at Bombay & ors. [**1994 II CLR 1156**].

5. For opposing the writ petition the Registrar (Legal) of this Court has filed affidavit-in-reply and supported the impugned order of compulsory retirement in the following words:

> "Petitioner - Ashokkumar Hiralal Lohiya, was working as Joint District Judge and Additional Sessions Judge, Pune when his case was reviewed after attaining the age of 54 years along with some other Judicial officers. He

has been compulsorily retired as a result of the screening of entire service record including his annual confidential reports and general perforamnce in accordance with sub-clause (i) of clause (a) of sub-rule (4) of Rule 10 of the Maharashtra Civil Services (Pension) Rules, 1982. The Review Committee formed opinion that he was unfit to be continued in the judicial service and hence in the public interest administrative action of compulsory retirement had been taken. Such compulsory retirement does not attach any stigma nor it is a punitive action. The Hon'ble Review Committee of the Hon'ble High Court in its meeting dated 14th October 2004 unanimously decided to discontinue the services of the petitioner. It was found that the petitioner had been rated as "average" for the years 1992-93 and 1993-94. He was also cautioned by the High Court to be more careful in the future regarding frequent availing of leave. I respectfully submit that the petitioner had been rated as "poor" for the years ending March 2001, 2002 and 2003 in his confidential report. His knowledge of law and

> procedure for these years is also reported to be "below average" and thus he has lost the effective utility as a unit of the judiciary. Consequently the Hon'ble Review Committee took decision in its meeting held on 14th October 2004 to discontinue his services in public interest."

. In the affidavit-in-reply it has been further pointed out that the petitioner was cautioned to be careful in future regarding availing of leave in the year 1993-94 while admitting that the petitioner was promoted to the cadre of District and Sessions Judge in August 1997. It has been further admitted that the disposal of the petitioner had also been endorsed to be Noteworthy and Satisfactory. It is further affirmed that the petitioner's case was not subjected to review on reaching the age of 50 years and the review undertaken after the age of 54 years is the first review. The affidavit emphasizes that the entire service record of the petitioner like annual confidential reports, leave account etc. has been taken into consideration and the said record shows that he was rated or found to be "average" and "poor" worker and, therefore, he lost his utility to the

judicial administration. This affidavit also refers to the judgment in the case of Nawal Singh v. State of U.P. **(2003) 8 SCC 117]** for the proposition that the subjective satisfaction of the Review Committee is sufficient to arrive at the decision of compulsory retirement of a judicial officer and by relying upon the judgment in the case of State of U.P. & ors. v. Vijay Kumar Jain **[AIR 2002 SC 1345]**, the affidavit states that adverse ACRs relating to ten years period prior to the date of consideration could also be taken as the basis for recommending compulsory retirement.

6. Mr.Kumbhakoni, the learned Associate Advocate General in his arguments on behalf of the respondents pointed out that the powers of judicial review in a petition under Article 226 of the Constitution challenging the order of compulsory retirement passed in public interest are very limited and it will not be permissible for the Court while deciding such a petition to sit in appeal over the decision taken by the Review Committee based on the service record. Mr.Kumbhakoni also referred to a number of decisions in support of his propositions that the impugned order passed in public interest does not suffer from

any infirmities and on the other hand it is justified on the basis of the entire service record of the petitioner. Mr. Kumbhakoni has placed before us a summary of the petitioner's service record from 1980-81 onwards in the form of a typed statement in addition to the files having been placed before us.

He has relied upon the following judgments:

. (1) Chanbasappa Dhanappa Konale v. The High Court of Judicature at Bombay **[1997 I CLR 30]**, (2) D.R. Shelke vs. State of Maharashtra & ors. **[1996 (1) Mh.L.J. 899]**, (3) R.W.Khan vs. State of Maharashtra & ors. **[1996 (1) Mh.L.J. 899]** and (4) High Court of Judicature at Bombay Vs. S.S. Patil & ors. **[(2000) 1 SCC 416]**.

7. In the case of Rajiah **[AIR 1988 SC 1388]** the Supreme Court dealt with the concept of compulsory retirement of a judicial officer in public interest and the said view was reiterated in the case of Bishwanath Prasad Singh v. State of Bihar & ors. **[(2001 2 SCC 305]** in the following words:

"12. Compulsory retirement in service jurisprudence has two meanings. Under the

various disciplinary rules, compulsory retirement is one of the penalties inflicted on a delinquent government servant consequent upon a finding of guilt being recorded in disciplinary proceedings. Such penalty involves stigma and cannot be inflicted except by following procedure prescribed by the relevant rules or consistently with the principles of natural justice if the field for inflicting such penalty be not occupied by any rules. Such compulsory retirement in the case of a government servant must also withstand the scrutiny of Article 311 of the Constitution. Then there are service rules, such as Rule 56(j), of the Fundamental Rules, which confer on the Government or the appropriate authority, an absolute (but not arbitrary) right to retire a government servant on his attaining a particular age or on his having completed a certain number of years of service on formation of an opinion that in public interest it is necessary to compulsorily retire a government servant. In that case, it is neither a punishment nor a penalty with loss of retiral benefits. (See

Shyamlal v. State of U.P., Brij Mohan Singh Chopra v. State of Punjab, S. Ramachandra Raju v. State of Orissa, Baikuntha Nath Das v. Chief District Medical Officer, Baripada.) More appropriately, it is like premature retirement. It does not cast any stigma. The government servant shall be entitled to the pension actually earned and other retiral benefits. So long as the opinion forming basis of the order for compulsory retirement in public interest is formed bona fide, the opinion cannot be ordinarily interfered with by a judicial forum. Such an order may be subjected to judicial review on very limited grounds such as the order being mala fide, based on no material or on collateral grounds or having been passed by an authority not competent to do so. The object of such compulsory retirement is not to punish or penalise the government servant but to weed out the worthless who have lost their utility for the administration by their insensitive, unintelligent or dubious conduct impeding the flow of administration or promoting stagnation. The country needs speed,

> sensitivity, probity, non-irritative public relation and enthusiastic creativity which can be achieved by eliminating the dead wood, the paperlogged and callous...."

In the case of Baikuntha Nath Das v. Chief District Medical Officer, Baripada **[AIR 1992 SC 1020]** a three-Judge Bench laid down five principles in respect of the order of compulsory retirement in public interest. The Court further stated that the High Court or the Supreme Court would not examine the matter as an appellate Court but it may interfere if it is satisfied that the order is passed: (a) mala fide, or (b) that it is based on no evidence, or (c) that it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material, in short if it is found to be a perverse order. In the case of P.K. Shastri (Supra) the significance of writing annual confidential reports was reiterated by a three-Judge Bench in the following words:

> "... Be that as it may, we think that the C.Rs. of an officer are basically the performance appraisal of the said officer and

go to constitute vital service record in relation to his career advancement. Any adverse remark in the C.Rs. could mar the entire career of that officer. Therefore, it is necessary that in the event of a remark being called for in the Confidential Records, the authority directing such remark must first come to the conclusion that the fact-situation is such that it is imperative to make such remarks to set right the wrong committed by the officer concerned. A decision in this regard must be taken objectively after careful consideration of all the materials which are before the authority directing the remarks being entered in the C.Rs..."

. Regarding the supervision and control of the High Court over the subordinate judiciary within the meaning of Article 235 of the Constitution, the Supreme Court in the case of Madan Mohan Choudhary (Supra) stated,

". Under this Article, the High Court's control over the subordinate judiciary is comprehensive and extends over a variety of

matters, including posting, promotion and grant of leave. The three words, namely, "posting", "promotion" and "grant of leave" used in this Article, are only illustrative in character and do not limit the extent of control exercised by the High Court over the officers of the subordinate judiciary.

... ...

. Transfers, promotions and confirmations including transfer of District Judges or the recall of District Judges posted on ex-cadre post or on deputation or on administrative post etc. etc. is also within the administrative control of the High Court. So also premature and compulsory retirement is also within the "Control" of the High Court.

. From the scheme of the Constitution, as set out above, it will be seen that though the officers of subordinate judiciary are basically and essentially Government servants, their whole service is placed under the control of the High Court and the Governor

cannot make any appointment or take any disciplinary action including action for removal or compulsory retirement unless the High Court is "CONSULTED" as required by the constitutional impact of both the Articles 233 and 234 and the "control" of the High Court indicated in Article 235."

. In the said case Their Lordships also dealt with the issue of consultation by the High Court in respect of the subordinate judiciary and put forward to the Governor / State Government, in the following words:

". The word "consult" in its ordinary meaning means "to ask advice" or "to take counsel". The Governor is thus a "consultor" and the High Court is the consultee" which is treated as an expert body in all matters of service including appointments, disciplinary action, compulsory retirement etc. relating to State Judicial Services. Since the Governor cannot act on his own unless he has consulted the High Court, the Constitution has conferred upon the High Court a sacred and

noble duty to give the best of advice or opinion to the Governor, an advice tendered after due deliberation and after taking into consideration all the relevant material and record relating to the problem on which consultation is made or advice is sought by the Governor. It is, therefore, essentially a matter of trust and confidence between the Governor and the High Court. The High Court cannot act arbitrarily in giving its opinion to the Governor or else it will be a betrayal of that trust. If the advice is not supportable by any material on record and is arbitrary in character, it may not have any binding value."

. In the case of High Court of Judicature at Bombay though its Registrar v. Shrishkumar Rangrao Patil & anr. **[(1997) 6 SCC 339]** the Supreme Court considered the ambit of Article 235 and the meaning of consultation by the High Court and it reiterated the legal position in paras 10 and 11. We may, therefore, usefully reproduce some of the observations made therein:

". It would thus be settled law that the control of the subordinate judiciary under Article 235 is vested in the High Court. After the appointment of the judicial officers by the Governor, the power to transfer, maintain discipline and keep control over them vests in the High Court. The Chief Justice of the High Court is first among the Judges of the High Court. The action taken is by the High Court and not by the Chief Justice in his individual capacity, nor by the Committee of Judges. For the convenient transaction of administrative business in the Court, the Full Court of the Judges of the High Court generally passes a resolution authorising the Chief Justice to constitute various committees including the committee to deal with disciplinary matters pertaining to the subordinate judiciary or the ministerial staff working therein. Article 235, therefore, relates to the power of taking a decision by the High Court against a member of the subordinate judiciary. Such a decision either to hold an enquiry into the conduct of a judicial officer, subordinate or higher

judiciary, or to have the enquiry conducted through a District or Additional District Judge etc. and to consider the report of the enquiry officer for taking further action is of the High Court. Equally, the decision to consider the report of the enquiry officer and to take follow-up action and to make appropriate recommendation to the Disciplinary Committee or to the Governor, is entirely of the High Court which acts through the Committee of the Judges authorised by the Full Court. Once a resolution is passed by the Full Court of the High Court, there is no further necessity to refer the matter again to the Full Court while taking such procedural steps relating to control of the subordinate judiciary."

. In High Court of Punjab & Haryana v. Ishwar Chand Jain **[(1999) 4 SCC 579]** the Supreme Court observed as under:

"32. Since late this Court is watching the spectre of either judicial officers or the High Courts coming to this Court when there is

an order prematurely retiring a judicial officer. Under Article 235 of the Constitution the High Court exercises complete control over subordinate courts which include District Courts. Inspection of the subordinate courts is one of the most important functions which the High Court performs for control over the subordinate courts. The object of such inspection is for the purpose of assessment of the work performed by the Subordinate Judge, his capability, integrity and competency. Since Judges are human beings and also prone to all the human failings inspection provides an opportunity for pointing out mistakes so that they are avoided in future and deficiencies, if any, in the working of the subordinate court, remedied. Inspection should act as a catalyst in inspiring Subordinate Judges to give the best results. They should feel a sense of achievement. They need encouragement. They work under great stress and man the courts while working under great discomfort and hardship. A satisfactory judicial system depends largely on the

satisfactory functioning of courts normally endorsed by the Full Court and become part of the annual confidential reports and are foundations on which the career of a judicial officer is made or marred. Inspection of a subordinate court is thus of vital importance. It has to be both effective and productive. It can be so only if it is well regulated and is workman-like. Inspection of subordinate courts is not a one-day or an hour or a few minutes' affair. It has to go on all the year round by monitoring the work of the court by the Inspecting Judge. A casual inspection can hardly be beneficial to a judicial system. It does more harm than good. As noticed in Registrar, High Court Madras v. R. Rajiah there could be ill-conceived or motivated complaints. Rumour-mongering is to be avoided at all costs as it seriously jeopardises the efficient working of the subordinate courts."

. More recently in his minority view in the case of Rajiv Ranjan Singh 'Lalan' vs. Union of India **[(2006) 6 SCC 613]** His Lordship Mr.Justice S.H. Kapadia stated on the ambit of Articles 233 and 235

of the Constitution as under:

> "87. Institutional autonomy of the High Court on its administrative side under Article 233 and Article 235 is a well-known concept. It is based on public trust and confidence. Existence of the power, as a concept, is different from exercise of power. Promotions and posting of judicial officers fall within its domain on its administrative side. At the same time it is important to note that choice of the candidate falls in the domain of public law and, therefore, that choice has to be exercised on some standard, failing which judicial review steps in. Standards of evaluation in matters of promotion and posting have to be uniformly applied otherwise, arbitrariness comes in. Integrity of the evaluation process has to be maintained. If different standards or no standards are applied it breaks the integrity of the process which brings in discrimination and arbitrariness which violates Article 14 and therefore judicial review.'

8. On the touchstone of these enunciations we will have to consider this petition and it is well settled that the order of compulsory retirement has to be decided on the basis of the entire service record of the officer concerned. At this stage itself we may clarify, on our enquiry as to whether the petitioner's case was placed before His Excellency the Governor after it was approved by the Hon'ble Chief Minister by relying upon the Constitution Bench decision in the case of Registrar (Admn.), High Court of Orissa v. Sisir Kanta Satapathy (dead) by LRs and anr. **[(1997) 7 SCC 725]**, Mr.Kumbhakoni, the learned Associate Advocate General invited our attention to the Rules of Business framed under Article 166(3) of the Constitution and pointed out that after the recommendations made by this Court on the administrative side are approved by the Hon'ble Chief Minister, the file is not required to be placed before His Excellency the Governor and we have perused the Rules and we agree with Mr. Kumbhakoni.

9. Now coming to the service record of the petitioner, the typed extract placed before us by the learned Associate Advocate General shows that right

from 1980-81 onwards the petitioner has been rated to be sincere, good, hard working and /or honest officer with good reputation and this assessment continues right upto 31st March 1996. Quality of his judgments was rated to be good, his reputation, integrity and character were found to be good and overall performance was assessed as "good" till 31st March 1996. As noted earlier in August 1997 he came to be promoted to the cadre of District Judges and was posted as Joint District Judge. For the period from 1st April 1996 to 31st March 1997 a Committee of five Judges of this Court rated the petitioner as a good officer. The quality of his judgments was found to be good and so was his reputation and integrity. The CRs for the period from 1/4/1997 to 31/3/1998 rated him to be overall "Fair" and as far as his integrity and reputation were concerned, he was found to be good. Similar was the assessment in respect of his quality of judgments. His ACRs for the period from 1/4/1998 to 31/3/1999 and 1/4/1999 to 31/3/2000 (two years) were recorded on 1st February 2003 by a Committee of five Judges of this Court and he was rated to be a good officer. In terms of his disposal of old cases and other cases the remark given is "noteworthy". He was then posted as the District and

Sessions Judge at Osmanabad from 22/9/2003 onwards. For the period from 1/4/2000 to 31/3/2001, 1/4/2001 to 31/3/2002 and 1/4/2002 to 31/3/2003 (three years) his ACRs were written by a Committee of five Hon'ble Judges of this Court on 9/10/2004 and the Committee found him to be "Poor" in his overall assessment. In terms of knowledge of law and procedure he was rated to be below average and same was the assessment in respect of his quality of judgments while disposal was noted to be noteworthy. Remarks about reputation and integrity were found to be "average" by the Committee for all the three years. The record does not show that his ACR for the period from 1/4/2003 to 31/3/2004 have been written, prior to the impugned order was passed on 3/11/2004. Thus in the ACRs written on 1/2/2003 he was found to be a good officer but in the ACRs written on 9/10/2004 he was found to be a poor officer. The Review Committee of four Hon'ble Judges (one of them was absent) and headed by the Hon'ble Chief Justice reviewed his service record and recommended compulsory retirement in the public interest.

10. As noted in our opening paragraph of this judgment, the petitioner has challenged the order of

compulsory retirement as well as the order rejecting his representation. He had submitted the representation to this Court through the Registrar General on or about 21/12/2004 and the Registrar General by his communication dated 28th February 2005 informed the petitioner that the Hon'ble the Chief Justice and Judges of this Court rejected the same. The petitioner is an officer appointed by the Governor / State Government as required under Article 233 of the Constitution and his appointing authority is, therefore, not this Court, notwithstanding the fact that such an appointment has to be made on the recommendations of this Court. The order of compulsory retirement dated 3rd November 2004 is passed by the State Government on the recommendations of the Review Committee of this Court and headed by the Hon'ble Chief Justice. Having regards to the Constitutional scheme, we are of the considered opinion that the representation submitted by the petitioner was required to be forwarded by this Court to the State Government with its recommendations so as to pass appropriate order and in this view we are supported by the judgment in the case of T. Lakshmi Narasimha Chari v. High Court of A.P. & anr. **[(1996) 5 SCC 90]**. It was not permissible for this

Court on the administrative side to decide the representation submitted by the petitioner. On receipt of such a representation it was necessary that it was placed before the Review Committee and the recommendations of the Review Committee ought to have been submitted to the State Government to pass the order on the said representation and no doubt the recommendations made by this Court would be binding on the State Government but the fact remains that the law does not permit that the representation submitted by the petitioner is finally disposed off by this Court on its administrative side. We, therefore, hold that the order rejecting the representation submitted by the petitioner and as intimated to him vide the communication dated 28th February 2005 by the Registrar General is unsustainable in law. The representation is required to be restored to the file.

11. Once the representation is restored to the file of this Court on its administrative side, it is open to the Review Committee to consider all the issues raised by the petitioner including the consideration of his entire service record as well as the rewards, promotions, extra increments etc.

granted to him. When such an opportunity is available for this Court on the administrative side to reconsider the petitioner's entire service record to deal with the representation for forwarding its recommendations to the State Government, we deem it appropriate that it would not be proper to consider the submissions made by the learned counsel for the petitioner on merits in challenging the order of compulsory retirement. We must leave it to the Review Committee to consider the petitioner's case afresh on the basis of his representation and forward its recommendations to the State Government as early as possible and we make it clear that it is not necessary that the petitioner is heard while his representation is being considered to submit the recommendations to the State Government though he may amend it. The recommendations have to be made, as noted earlier, on the basis of the entire service record of the petitioner and undoubtedly in keeping with the settled legal position which has been briefly referred to hereinabove.

12. In the premises this petition succeeds partly and the communication dated 28th February 2005 addressed to the petitioner by the Registrar General

as well as the order rejecting the petitioner's representation dated 21/12/2004 is hereby set aside. The petitioner's representation is restored to file and it is directed that the Registrar General of this Court will place the same before the Review Committee as early as possible for forwarding its recommendations to the State Government. The petitioner may, if so desired, amend the representation within a period of four weeks from today.

13. Rule is made absolute accordingly but with no order as to costs.

(NARESH H. PATIL,J.) (B.H.MARLAPALLE,J.)